Referral Date: January 6, 1999

In the Matter of

JOHN NETTER,

Claimant

v.

INGALLS SHIPBUILDING, INC.

Employer

CASE NOS.: 1998-LHC-01026
1998-LHC-01027

Appearances:

John G. McDonnell, Esq.,
For the Claimant

Paul M. Franke, Esq.,
For the Employer

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, (hereinafter the Act)[1] and the regulations promulgated thereunder. A hearing was held before me in Gulfport, Mississippi on August 11, 1998 at which time the parties were given the opportunity to offer testimony and documentary evidence, and to present oral argument. At the hearing Claimant's exhibits A1 through F17 and Employer's exhibits 1 through 15 were admitted, whereupon the record closed.[2] Upon conclusion of the hearing the due date of October 1, 1998 was established for submitting closing arguments. Because hurricane Georges intervened, Employer's request for a thirty-day extension of that date was granted. Claimant's brief was received on October 26, 1998, and Employer's argument arrived on October 28, 1998.

[1] All statutory references herein refer to Title 33 of the United States Code unless otherwise indicated, and are designated by section number only.

[2] The following references appear herein: "C" for Claimant's exhibits, "EX" for Employer's exhibits and "TR" for hearing transcript.

I. Statement of the Case

Claimant, a welder and electrical cable-puller, incurred a work-related injury to his right elbow when it struck a ship's bulkhead while he was pulling cable on March 9, 1993. After conservative treatment by Dr. Chris Wiggins, Mr. Netter underwent surgery. He then returned to work in September 1994 with a 10% permanent disability, according to Dr. Wiggins. While he received some disability compensation from Employer, Claimant contends that he should have been compensated pursuant to either §910(b) or (c), and advocates an average weekly wage (AWW) of $406.40. Employer asserts that it appropriately computed Claimant's compensation by dividing his actual earning for Ingalls by the number of weeks it employed him (14), yielding an AWW of $303.12, and argues that §910(c) is applicable when determining his AWW. *Employer's Brief* at 12; TR 11 - 12. Since he was paid compensation based on an AWW of $270.91, according to Claimant, he is entitled to the difference attributable to the disparity.

On August 16, 1995 Claimant re-injured his right elbow. He had returned to welding duty, and his elbow struck a steel hanger after he tripped over a beam. He received additional treatment and underwent three operations for the ailment. Claimant achieved maximum medical improvement (MMI) in November 1996 and has not returned to work since the re-injury, except for a brief period for Employer. He was examined by Dr. Guy Rutledge, who declared Claimant achieved MMI on November 15, 1996, whereafter his right upper extremity was 15% permanently, partially disabled. According to Claimant, the doctor's examination was insufficient; thus, the controlling date for Mr. Netter's MMI should determined by Dr. Crotwell's report, which states that Claimant achieved MMI as of August 8, 1998 and incurred a 28% permanent and partial disability. (TR 7 - 9). Employer urges that Claimant was capable of returning to work as of November, 1996, and that thereafter Claimant suffered from a 15% partial loss of arm use.

II. Stipulations

The parties have stipulated, and, based on the record, I find that:

1) Claimant suffered accidents or injuries to his elbow on March 9, 1993 and August 16, 1995.

2) The injuries occurred within the course and scope of Claimant's employment.

3) The parties are subject to the Act.

4) Claimant was Employer's employee at the time of the injuries.

5) Employer was timely notified of the injuries.

6) Employer timely filed notices of controversion for these matters.

7) Regarding the March 9, 1993 accident:

A) Claimant was compensated for temporary total disability from March 22, 1993 to April 11, 1993; from April 19, 1993 to May 23, 1993; and from February 18, 1994 to September 12, 1994. Additionally, he received permanent partial disability compensation based upon a 10% impairment to the upper extremity, for 31.2 weeks.
B) Total compensation amounted to $12, 372.35, and all medical bills were paid.
C) Claimant achieved MMI on September 16, 1994.
D) Claimant returned to work for Employer in suitable employment.

8) Regarding the August 16, 1995 accident:
A) Claimant was paid compensation for disability periods for August 17, 1995; from August 21, 1995 to September 17, 1995; from October 10, 1995 to January 8, 1996; and from February 6, 1996 to October 6, 1996.
B) Said compensation totaled $23,798.28, and was based on an AWW of $455.95.
C) Employer's outlay for medical bills to date is $39,824.52.
D) Claimant achieved MMI on November 15, 1996.
E) Claimant resumed working for Employer in suitable employment.

III. Issues

In light of the above stipulations and the arguments of the parties, the issues for adjudication are:

1) Regarding the March 9, 1993 injury:
A) Claimant's AWW at the time of the injury.
B) Employer's compensation to Claimant.
C) Penalties and attorney's fees, if appropriate.

2) Regarding the August 16, 1995 injury:
A) The nature and extent of Claimant's disability.
B) Whether Claimant is entitled to additional compensation in accordance with the Act.
C) Claimant's AWW at the time of the injury.
D) Penalties and attorney's fees, if appropriate.

The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. I note initially that Claimant has the burden of persuasion in proving factors of entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries, et al.*, 512 U.S. 267 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Since the

accidents that form the bases of these claims occurred in Mississippi, the rulings of the Fifth Circuit Court of Appeals are germane to this matter.

IV. The 1993 Injury Claim

As stated, the sole issue for adjudication pertaining to Claimant's 1993 elbow injury requires determination of his AWW.

In traumatic injury cases such as this, the claimant's AWW is determined as of the time of the injury for which compensation is claimed. 33 U.S.C. § 910; *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 92 (1991); *Merrill v. Todd Pac. Shipyards Corp.*, 25 B.R.B.S. 140, 149 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 B.R.B.S. 196, 200 (1989). AWW is typically calculated in accordance with §910(a) or (b). Section 910(a) applies where "the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury . . ." Section 910(b) controls where "the injured employee shall not have worked in such employment during substantially the whole of such year . . ." *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir.1991). However, if neither provision can be fairly and reasonably applied, or if the employment assessed is seasonal or intermittent, or if the claimant had various employments in the years prior to injury, including non-longshoring activities and self-employment, then the provisions of §910(c) govern determination of the AWW. §910(c); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983); *Hayes v. P & M Crane Co.*, 23 B.R.B.S. 389, 393 (1990).

The following evidence pertaining to this issue has been submitted:

Claimant testified at the hearing for this matter. Mr. Netter is forty-nine years old and unmarried, and attained an eleventh grade education level. (TR 21 - 22; EX 15 at 4 - 5). He stated that he first worked for Ingalls as a welder from 1974 to 1983, during which was laid off three times. (TR 22, 63 - 64). He was a cement finisher by trade before then. (EX 15 at 5 - 6). Employer then formally trained him as a welder. (EX 15 at 5 - 6). In 1983 Mr. Netter was laid off by Employer, and he performed various jobs over the next few years, including loading soft drink trucks, janitorial work, cement work and welding. (TR 23 - 24, EX 15 at 7 - 8). According to Mr. Netter, the construction company he worked for during the year prior to his return to Ingalls in 1992 closed, and he was unemployed for an unspecified period. (TR 25). During that time, which was the year preceding the March 9, 1993 injury, he sometimes performed bricklaying for his neighbor's business for $8 to $10 per hour. (TR 22, 25 - 26, EX 15 at 9 - 10). When he did, his schedule varied from one to five days a week. (TR 25). At his deposition, Mr. Netter stated that he was not working during that period. (EX 15 at 15 - 16).

Mr. Netter stated that when he returned to Ingalls in November 1992 he initially performed welding, and was paid more than $10 per hour. (TR 26 - 27, EX 15 at 11). He had been re-schooled in the trade, and re-certified as well. (EX 15 at 11). In early 1993 he was laid

off, and then re-hired as an electrical cable puller, which was his position when he was injured. (TR 28 - 29, EX 15 at 12).

Mr. Netter's claim appears in the record, apparently mis-dated September 2, 1992, and reflects his assertion that he was a cable puller at the time of the accident. (CA3). Employer's notice of final payment of compensation was also included, and shows Claimant's payments were based on a $270.42 AWW. (CA 3, EX 4).

The patient history in Dr. Chris E. Wiggins' note of March 13, 1993 shows Claimant was a cable puller for 3 months before he was injured. (CB1). Dr. William Crotwell III's September 23, 1993 patient history notes also reflect Claimant was pulling cable when he was hurt, and the reports of Robert E. Walker, Jr., M.Ed., C.R.C. reflect Claimant was so employed when he was hurt, and that he was employed as a cable puller and welder during the course of employment at Ingalls. (CB 2, CC 2, EX 6, EX 13). Tommy Sanders, C.R.C.'s report of February 11, 1997 indicates he understood that "Mr. Netter's entire work history has been as a welder." (EX 14). A subsequent report qualified this statement by adding the word "primarily". (EX 14).

In his response to interrogatories, Claimant stated that he is a trained welder, and that he previously worked for a piping company, and a concrete finisher/bricklayer. He had also been self employed as a house painter. No dates were given for the latter positions. (CE 2).

Earnings documents that were submitted include paycheck stubs for the weeks ending March 21, July 25 and August 15, 1993, which show gross earnings of $358.43, $358.40 and $350.40, respectively, for 40 hours of work. A report of his earnings prior to the injury, beginning on the pay period of November 8, 1992 and ending on March 7, 1993, during which he was paid $9.73 per hour until he was switched from the welding department to the electrical cable-puller position starting in the March 7, 1993 period, where he received $8.76 per hour. (CD 1, CF 3, EX 10). He had no earnings from February 7 to the 28th, 1993. *Id.* The record also contains a letter from Employer to Claimant dated November 19, 1993 in which the latter is offered a welding position at $10.16 per hour. (CXF 16).

Neither party contends that Claimant satisfied the requirements of §910(a), and both agree that the provisions of §910(a) do not apply here. *Claimant's Brief* at 13; *Employer's Brief* at 9 - 10. The record supports this conclusion. The payroll records indicate that Claimant began working for Employer during the November 8, 1992 pay period, approximately four months prior to the accident. (CF3). During that period he was transferred from welding to cable-pulling work, which entailed different wages and wholly different tasks. Prior to his re-hiring in November 1992, he intermittently performed concrete finishing and brick-laying (although from the context of the hearing and deposition testimony it is clear that he considered himself unemployed since he had no regularly scheduled job). (TR 23 - 25). Therefore, in light of the agreement of the parties, the short duration that he worked for Employer prior to the injury, the variety of jobs he held before the accident, and the intermittent nature of his work during the year preceding year, §910(a) is inapplicable here. §910(a); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds,* 462

U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (1983); *Gilliam v. Addison Crane Co.*, 21 B.R.B.S. 91, 93 (1987).

Section 910(b) states:

> If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings . . . shall consist of . . ., if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

Section 910(b) is inapplicable as well. "Such employment" refers to Claimant's job when he was injured. §910(a), §910(b). Claimant did not work as an electric cable-puller, or in the electrical department, during the preceding year; the uncontroverted evidence shows he began that job during the pay period in which he was injured. However, no evidence has been submitted regarding the wages of an employee of that class. There is, therefore, no basis for determination of an AWW, as required by §910(b). §910(b)*; see also Palacious v. Cambell Industries*, 633 F.2d 840, 842 (9th Cir. 1980); *Sproull v. Stevedoring Servs. of America*, 25 B.R.B.S. 100, 104 (1991).

Since neither §910(a) nor (b) are applicable, §910(c) is applicable here. §910(c); *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 23, 25 (9th Cir. 1976), *aff'g and remanding in part* 1 B.R.B.S. 159 (1974); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 94 - 96 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). I note that Employer advocated use of this section, and Claimant agreed it applied if §910(b) was inapplicable, although Claimant did not provide any argument or suggestion as to §910(c)'s application in this instance.

Section 910(c) provides that the AWW shall consist of

> such average annual earnings . . . as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The purpose of this section is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936

F.2d 819, 823, 25 26 (CRT) (5th Cir. 1991). Actual earnings immediately preceding the injury are a consideration, but are not necessarily controlling. *National Steel &Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part* 5 B.R.B.S. 290 (1977); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 B.R.B.S. 26 (CRT) (5th Cir. 1991). Additionally, earnings from non-longshoring work may be considered, provided the claimant is unable to perform that work as well. *Harper v. Office Movers/E.I. Kane*, 19 B.R.B.S. 128, 130 (1986). Adverse effects upon earnings due to intermittent work availability may also be considered. *New Thoughts Finishing Co. v. Chilton*, 31 B.R.B.S. 51, 53 - 54 (5th Cir. 1997). In applying this section I am accorded broad discretion. *Wayland v. Moore Dry Dock*, 25 B.R.B.S. 53, 59 (1991).

Upon reviewing the evidence of record it is clear that Claimant was subject to intermittent, varied employment and periods of involuntary unemployment, which were not shown to be caused by forces other than those of the labor marketplace. Therefore, it is appropriate to include this time in the §910(c) calculations, in light of the objective therein to affix a fair approximation of wage earning capacity at the time of the injury. *New Thoughts Finishing Co., supra.* I therefore note the period of unemployment preceding his November 1992 rehiring, as well as the lay-off lasting approximately one month, immediately before his electrical department position. I find that his wages while working as a welder for Employer are a reliable indicator of his wage earning capacity when he was injured. The record shows that he was a welder by trade, received training in that field, and he welded for Employer for 9 years previously. After he was first laid off he continued to perform welding work at times, according to his testimony. Since employer re-hired him as a welder, and he performed that work until one month before his 1993 accident, I include those wages earned by welding in the calculation. I also consider his cable-laying wages when making this calculation, since he was earning a wage from that labor at the time of his injury. However, the record yields an insufficient basis for factoring his bricklaying work into the calculation, in light of the vague references made as to the frequency and duration of the jobs and the amounts he was paid, and the absence of any supporting documentation. (TR 25 - 26). I also note the absence of wage records for Claimant's earnings prior to the year preceding his March 1993 injury.

In light of the evidence presented, therefore, I look to Claimant's earnings during the year preceding his injury, as documented in the record, as well as to his earnings when his elbow was hurt in 1993. He earned $4,243.68 while working for employer as a welder and cable-layer during that period. No other wages were defined or documented, as stated above. Thus, I find that Claimant's annual earning capacity at the time of his injury was $4,243.68. Section 910(d)(1) requires that this amount be divided by 52 in order to determine Claimant's AWW. Therefore, Mr. Netter's average weekly wage at the time of his March 9, 1993 injury was $81.61. Since this AWW is below that used by Employer when it calculated its disability payments to Claimant for the March 9, 1993 injury, Claimant is not entitled to additional compensation for that injury. I note that simple extrapolation of Claimant's AWW based upon the $8.76 hourly wage that he earned when he was injured is neither proper nor possible. The record is devoid of evidence regarding the number of hours he was re-hired to work, a necessary factor to calculate his annual wages.

V. The 1995 Injury Claim

The issues under contention in the 1995 claim chiefly pertain chiefly to the nature and extent of Claimant's disability, and whether he is entitled to additional compensation in light of these findings.

Nature and Extent of Claimant's Injury

The claimant bears the burden of proving the nature (i.e. temporariness or permanence) and extent (i.e. whether it is partial or total) of his disability by a preponderance of the evidence, in accordance with the Act. *Greenwich Collieries, supra*; *Carroll v. Hanover Bridge Marina*, 17 B.R.B.S. 176 (1985). The extent of disability is discerned by examination of economic and medical factors. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. 1991). A claimant is disabled when he is incapacitated because of his injury and therefore cannot "earn the wages which the employee was receiving at the time of the injury in the same or any other employment . . ." §902(10). Total disability is shown if the claimant proves that he is unable to perform his regular or usual work because of his job-related injury. *Roger's Terminal v. OWCP*, 784 F.2d 687, 690 (5th Cir. 1986); *Elliot v. C&P Tel. Co.*, 16 B.R.B.S. 89 (1984). His "usual" employment consists of his regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 B.R.B.S. 689 (1982). He need not show that he cannot return to *any* employment, but rather, he must prove that he cannot return to his former employment. *Elliot, supra*. This determination requires comparison between the claimant's medical restrictions/physical abilities and the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 B.R.B.S. 100 (1988).

"[A]vailability of suitable alternative employment distinguishes total disability from partial"; that is, a claimant's disability changes from total to partial once he can perform or be trained for other realistically available jobs, in light of relevant employment factors such as the claimant's physical condition, age, education, employment history, rehabilitative prospects and availability of work. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994). Employer bears the burden of so proving. *Palumbo v. Director, OWCP*, 937 F.2d 70, 73 (2nd. Cir. 1991). An employer can meet its burden by offering the claimant a job in its facility, including a light-duty job, so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 B.R.B.S. 224 (1986); *Spencer v. Baker Agricultural Co.*, 16 B.R.B.S. 205 (1984). Such a job must be necessary, and the claimant must be capable of performing the work. *Darden, supra*. Should the employer fail to prove suitable alternative employment, the claimant must be found to be totally disabled. *Manigault v. Stevens Shipping Co.*, 22 B.R.B.S. 332 (1989). If availability of suitable alternative employment is demonstrated, then the claimant must show that he was unable to secure such employment, despite his diligent efforts, in order to be found totally disabled. *Abbott, supra* at 121; *Roger's Terminal, supra* at 691.

Regarding the nature of a claimant's disability, it is permanent rather than temporary if it has continued for a lengthy period and appears to be of a lasting or indefinite duration, rather than

one in which recovery awaits a normal healing period. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert denied*, 394 U.S. 976 (1969). Thus a claimant is considered permanently disabled if, upon reaching maximum medical improvement (MMI), he has a residual disability. *Louisiana Insurance, supra* at 126. The date of onset of permanent disability is determined by reference to the medical evidence of record, without regard for economic or vocational factors. *Id.*; *Ballesteros v. Willamette W. Corp.*, 20 B.R.B.S. 184, 186 (1988).

The following evidence was submitted regarding these issues, pursuant to the 1995 elbow re-injury, summarized below in view of the above stipulations:

Claimant's Testimony

Claimant testified that he returned full-time (light duty) to Employer's electrical department with a 5% disability rating on his right elbow on September 16, 1994, after he recovered from the 1993 accident. (TR 38, EX 15 at 16 - 17). He then returned to the welding section. (EX 15 at 17 - 18). On August 16, 1995 he then re-injured his right elbow when he tripped and struck his elbow against a piece of iron. (TR 40 - 41, EX 15 at 17 - 19). He was treated by Dr. Warfield in Employer's hospital, who indicated that the injury was minimal. (EX 15 at 22). Employer also referred him to Dr. Crotwell (see below), who went on to perform surgery upon Claimant three times, with no improvement, according to Mr. Netter. (TR 42 - 43, EX 15 at 19 - 23). Dr. Crotwell found Claimant maximally medically improved as of November 15, 1996. (EX 15 at 25). He was also examined twice by Dr. Winters between Claimant's surgeries, and the doctor approved of additional surgery. (EX 15 at 24). As of November 5, 1997 Claimant took medication for pain, his "stomach", arthritis "that set in the arm . . ." and for a nerve in his elbow. (EX 15 at 28).

Claimant "went back to the shipyard" after his injury, with permanent restrictions against overhead lifting and climbing ladders, and was alternated in the welding and electrical departments. (TR 43 - 45, EX 15 at 27, 29). He last worked for Employer on approximately January 14, 1997, after he informed Employer that he could not pull cables, in light of his restrictions. (TR 45, EX 15 at 29 - 30).

After that, Claimant sought other employment, by submitting applications to the Department of Labor's (DOL) rehabilitation personnel and the Department of Veterans Affairs. (TR 45). Additionally, he received three job referrals from his Employer; two were for security work, one was a cashier job. (TR 46). Dr. Crotwell rejected the cashier position, Claimant stated, and the security jobs were subject to restrictions. (TR 46, EX 15 at 30 - 31). Claimant asserted that he pursued those leads, but was told by the companies that they were not hiring. (TR 46 - 47). A DOL rehabilitation specialist accompanied Mr. Netter to prospective employers, and he submitted applications for positions that the specialist provided. (TR 47 - 48). Further, leads from a Mr. Sanders for part-time security positions at Wal-Mart and Moss Point were inquired about quickly, and did not reveal job prospects. (TR 48 - 49). Applications for truck driver (on which he indicated several prior infractions) and heavy equipment operator jobs

were completed as well, to no avail yet. (TR 50 - 51). Claimant testified that he submitted every application he received from the Department of Labor specialist. (TR 51). At the November 5, 1997 deposition Claimant stated that, as of that date, he had not applied for employment with anyone aside from Ingalls, since he achieved MMI in November 1996. (EX 15 at 29). He continues to seek employment through the specialist and a Mississippi rehabilitation facility, and prefers positions with compensation that is comparable to his former position with Ingalls. (TR 49 - 51, 76 - 77). As of the November 5, 1997 deposition, Claimant would also have accepted light duty work for Employer. (EX 15 at 31).

Mr. Netter stated he was ordered by the doctor to avoid construction jobs, and the doctor told Claimant that his restrictions are permanently imposed. (TR 53). He takes medication for pain, arthritis, infection and his nerves. (TR 53). Further, he occasionally wears a rubber sleeve on his right elbow when it swells. (TR 53 - 54). He continues to undergo vocational rehabilitation. (TR 80).

Claimant also described his visit to Dr. Rutledge. (TR 54 - 56). According to Claimant, the extent of Dr. Rutledge's examination involved inquiry about pain and administration of x-rays. The doctor also examined prior records. (TR 55). That was the sole visit with the physician, Claimant stated. (TR 55 - 56). Mr. Netter was also seen by a physical therapist Dr. Crotwell referred him to, who performed walking, weight-carrying and hand dexterity tests. (TR 56 - 57). Claimant also received physical therapy in the doctor's office. (TR 57 - 58).

Documentary Evidence

The records of Drs. Chris Wiggins, M.D., William Crotwell, M.D., Guy L. Rutledge, III, M.D., Charles M. Winters, M.D., and Claimant's Rehabilitation records, were submitted for my consideration. (CXB 1 - 7, CXC 1 - 9, EX 6 - 9, 13, 14).

Dr. Wiggins' (Board certified, orthopaedic surgery) records reflect 10 visits with Claimant, from March 13, 1993 to July 9, 1993. (CXB 1). They pertained to the March 9, 1993 accident, and Mr. Netter's diagnosis was right lateral epicondylitis, possible acute tear of the extensor tendon origin at the right elbow. Percutaneous extensor tenotomy right elbow surgery was performed on April 27, 1993. Complaints of pain continued after the procedure, and on July 9, 1993 the doctor assigned a 5% permanent partial disability of the right arm and imposed restrictions on right hand use at work for 3 months. (CXB 1).

Dr. Crotwell's (Board certified, orthopaedic surgery) records from September 23, 1993 to January 29, 1998 were submitted as well. (CXB 2, EX 6, 12). Initially he treated Claimant for the November 1993 injury after he was released from Dr. Wiggins' care. After injecting and bracing the elbow without improvement, Claimant against underwent surgery for his recurrent tennis elbow on April 6, 1994. Progress was noted thereafter and he was released to light duty on June 6, 1994 and regular welding duty on September 2, 1994. MMI was achieved on September 12, 1994, and Mr. Netter had a 10% permanent impairment of the right arm, and 6% on the whole. Complaints of pain then increased as of October 27, 1994, and on August 24,

1995 the doctor noted the August 16 trauma to the elbow, and prohibited arm use until September 5, whereupon regular duties could be resumed. However, the right arm remained swollen and painful, and on February 7, 1996 surgery was again performed, and a calcific mass was removed. After the operation, he was diagnosed with tardy ulnar nerve syndrome, and surgery to transfer the nerve was performed on May 13, 1996. A functional capacities evaluation was noted on October 4, 1996, and the doctor permitted Mr. Netter to return to light duty work, with restrictions of 15 lbs. of infrequent lifting, 10 lbs. of frequent lifting, and prohibitions on shoulder and repetitive right arm work, and ladder climbing, as of October 7, 1996. Claimant achieved MMI on November 15, 1996, and his disability amounted to 10% of the upper extremity, and 6% on the whole in light of the surgery and range of motion loss. Further, pertaining to his ulnar nerve problem, weakness and loss of motion, he suffers from an 18% permanent upper extremity disability and 11% disability as a whole, resulting in a total of 17% "disability as a whole in the upper extremity."

On February 7, 1997 Dr. Crotwell opined that elbow and nerve problems remain, and Mr. Netter "may reach a point where he plateaus." As of April 28, 1997 Claimant could not perform cashier work, but guard work was possible provided it conformed to the above restrictions. A letter signed by the doctor on November 19, 1996 indicates that Claimant achieved MMI on November 15, 1996, he had a permanent partial impairment of 28% to the right arm, which equaled 17% to his entire body, and his permanent restrictions included those mentioned above, as well as no repetitive work with his right arm, and light duty only. Letters included at CXB 3 that described the above were included as well. Additionally, a form signed by Dr. Crotwell and dated July 16, 1998 appears at EX 14. Three job descriptions - security guard, fuel booth attendant and gate security - were presented, and "yes" was checked by each.

A medical report by Dr. Winters dated January 15, 1996 appears as well. (CXB 3, EX 7). The physician diagnosed tennis elbow, and complaints of elbow pain and numbness were noted. On examination, Claimant demonstrated full range of motion and good arm and grip strength. An MRI scan showed calcification near the lateral epicondyle. Dr. Winters did not object to the surgery recommended by Dr. Crotwell, although it would not be a cure, since Claimant was "always going to have some problems . . ." Notes dated May 6, 1996 show complaints of elbow pain persisted, and a full range of motion was demonstrated, as was diffuse tenderness. The doctor's impression was cubital tunnel syndrome, status post extensive surgery for tennis elbow. No definite signs of problems with the tennis elbow were found, and cubital tunnel syndrome was related to Claimant's previous surgery. Additional surgery was approved, permanent restrictions were not anticipated, and a permanent partial impairment of 5% to the right arm was expected. (EX 7).

Notes dated August 16 to 18, 1995 following Dr. Winters' reports were present in the record, but were not attributed, and were illegibly initialed. (EX 12).

Dr. Rutledge opined by report dated June 13, 1997. (CXB 4, EX 8). His diagnosis was residual tennis elbow pain after two procedures and status post submuscular transposition left ulnar nerve with no residual testable ulnar nerve dysfunction. On examination Mr. Netter

demonstrated full range of motion, diffuse tenderness laterally, mild increase of elbow discomfort on resisted wrist extension and no wrist/arm atrophy. X-rays revealed evidence of his prior elbow surgery, an adjacent fragment of calcium and mild, diffuse degenerative change in the elbow. Claimant had a 15% permanent disability in his arm given his residual weakness, discomfort and scarring from his elbow surgery. No "accessible anatomic impairment" was found due to his ulnar nerve problem. He could not return to his welding position, according to the doctor, although Mr. Netter "can probably do more than a 15 to 20 pound lifting job." (CXB 4).

Records from the Springhill Memorial Hospital Rehabilitation Institute were also submitted. (CXB 5, EX 9). Claimant underwent a functional capacity evaluation on September 23, 1996 at the hospital. His range of motion was normal, except for complaints of pain upon right elbow flexion and extension. Manual muscle testing showed normal results, except for increased pain upon right elbow resisted maneuvers. Claimant could lift and carry 15-20 pounds occasionally, and 10 pounds frequently, although testing yielded complaints of pain; pushing/pulling, crawling and overhead tasks with his right elbow should be limited to less than 10% of his work (again, testing resulted in complaints of pain); Claimant could bend, squat, kneel occasionally, and could not climb safely; and he could frequently walk and use stairs. Walking, standing and sitting abilities were normal, and Claimant was incapable of firm grasping and fine manipulation with his right hand. Throughout the test he was limited by reports of pain within his right arm, which he periodically guarded. On a scale of 1 to 10, he rated his pain at 8 prior to the evaluation and 9.5 afterward. Daily pain rated an 8. Light duty work, within the above lifting restrictions, was recommended. Work hardening was not, in light of Claimant's expressed absence of return-to-work goals.

A bone scan performed at Springhill Memorial Hospital on November 27, 1995 showed minimal increased tracer accumulation over the right elbow, and an MRI of the left elbow revealed calcific tendinitis.

Two reports from the West Mobile Orthopedic Center Physical Therapy Department, dated June 6 and November 8, 1996 were submitted, as were records of his prescriptions.

Vocational rehabilitation reports by Robert Walker, Jr., M.Ed., C.R.C., appear in the record. (CXC 2 - 4, EX 13). Mr. Walker described Claimant as "very cooperative" and "motivated to work," and verbal complaints of right elbow pain were made. A work history consistent with that expressed by Mr. Netter, *supra*, was taken, as was personal, education and behavioral information. The cable puller and welder jobs were considered medium to heavy, according to the *Dictionary of Occupational Titles*.

As of July 25, 1996, given expressed interest in truck/shuttle bus driver and casino security guard positions, Mr. Walker found "job possibilities" with five casino- and casino-related companies for security guard or bus driving positions, of which three were actively hiring. Pay ranged from $5.50 to $8.00 per hour. The work hours were not described. Locksmith trainee (up to $500 - 750 weekly, possibly), industrial/commercial security guard

($5.25 to $6.14 hourly) and school bus driver jobs were possible as well. Twenty-eight employment contacts were made between November 7 and December 15, 1997, of which fourteen were actively hiring for positions that Mr. Netter could possibly have performed. The jobs included customer service, housekeeping, security guard, equipment operator, auto parts sorter, valet parking attendant and cafeteria aide. Pay ranged from $4.15 plus tips to $8.00 per hour, although salaries were not present for each description. Between January 9 and February 10, 1998 thirteen leads for jobs were investigated, which yielded six possible positions for Mr. Netter for which applications were being accepted. These included equipment operator, mail distribution clerk, meter reader and clerical jobs. Salaries ranged from $16,000 to $18,000 annually, although most of these descriptions did not include a pay range.

Tommy Sanders, C.R.C. also sought jobs for Claimant. (CXC 6 - 8, EX 14). A May 19, 1997 "Labor Markey Survey Update" presented three prospective employers, hiring for cashier and security guard jobs. The wages ranged from $4.75 to $5.35 per hour for full-time work, and the employers were receptive to hiring someone with Mr. Netters' characteristics. (EX 14). In light of the lifting, repetitive work and ladder climbing restrictions, Mr. Sanders referred two security guard and a cashier position on February 11, 1997. These were 40 hours per week jobs that paid between $4.75 and $5.00 per hour. Mr. Sanders classified Claimant as capable of performing a wide range of sedentary to light physical activities, and as possessing basic academic skills. As of July 9, 1998 a fuel booth cashier and three security guard jobs were indicated. The former involved accepting payment for purchases and cleaning duties once per shift, paid $5.25, required a 32 hour work week, and included health insurance. The security positions were part- and full-time, required little lifting, and paid between $5.15 and $7.00 per hour. Mr. Sanders' July 17, 1998 report summarized these findings. Additional positions were indicated in a July 31, 1998 report, including a casino security position (20 - 40 hours weekly, $7.25 per hour); security guard for a security company (24 - 40 hours weekly, $5.30 per hour); cab driver (60 weekly, $250 - $300 per week); and cashier (full time, $5.50 - $6.50 per hour). An August 4, 1998 status report related that Claimant had not applied for four of the positions to which he was referred; he felt incapable of one job (cashier) and would shortly apply for 2 of the other employers. By letter of August 7, 1998 Mr. Sanders conveyed Claimant was selective in his job search, but qualified for all positions forwarded by Mr. Sanders. (EX 14).

A February 15, 1998 application for federal employment was included; however, the position Claimant sought was not apparent. (CXC 9).

Claimant argues that he has been temporarily, totally disabled since the accident, and shall remain so until he is released from his vocational rehabilitation by the DOL. *Claimant's Brief* at 29. Employer does not dispute that Claimant experienced temporary, total disability after his accident; rather, it asserts that Claimant achieved MMI, and suitable alternative employment was available, as of November 15, 1996. *Employer's Brief* at 13.

In light of the parties' positions, and the uncontroverted assertion that Claimant cannot perform his prior employment duties, he has established a *prima facie* case of total disability. *Wilson v. Crowley Maritime*, 30 199, 203 (1996). I therefore proceed to the crux of the matter

regarding the extent of Claimant's injuries, namely, when, if at all, suitable alternative employment was shown to be available to Claimant after his August 16, 1995 accident, since that is the date on which a claimant's total disability becomes partial. *Louisiana Ins. Guar. Ass'n, supra.*

A showing of suitable alternative employment requires that the employer establish the existence of "work available to a claimant which is within that claimant's physical and educational ability, experience, etc. to perform and secure." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041, 14 156 (5th Cir. 1981), *rev'g* 5 418 (1977). The jobs must be reasonably available in the community, and there must be a reasonable likelihood that the claimant would be hired, provided he diligently sought the position, in order to be considered "available." *Id.* at 1042 - 1043. The employer need not rehire the claimant to satisfy its burden, nor place him in the position, but employer must show specific jobs are available in the community. *Id.*; *Armfield v. Shell Offshore, Inc.*, 30 B.R.B.S. 122, 123 (1996). Evidence on this issue presented by job counselors may be considered. *Southern v. Farmers Export Co.*, 17 B.R.B.S. 64, 66-67 (1985). Vocational rehabilitation training is not relevant determining the extent of a claimant's disability. *Hayes v. P & M Crane Co.*, 23 B.R.B.S. 389 (1990), *vacated on other grounds*, 24 116 (CRT) (5th Cir. 1991); *Mendez v. Bernuth Marine Shipping*, 11 B.R.B.S. 21, 29 (1979), *aff'd*, 638 F.2d 1232 (5th Cir. 1981). If employer so shows the availability of suitable alternative employment, then the burden shifts to the claimant to prove that, despite the exercise of due diligence, he was unable to attain the suitable alternative employment.

I find that Claimant's condition became partial in extent as of July 31, 1998. Review of uncontroverted testimony, summarized above, revealed that Claimant was a 49 year old male with an 11th grade education, whose trade skills included welding (for which he was formally trained), cement work, brick laying and janitorial work. His physician proscribed right arm repetitive work, as well as lifting 10 pounds frequently, and 15 pounds infrequently, with that appendage. Additionally, he cannot perform work at or above shoulder level, nor can he climb ladders. The functional capacities evaluation supports this, and that test was reviewed by both Dr. Crotwell and Dr. Rutledge. Although Dr. Rutledge felt Claimant can lift more than these limits, he stated so in uncertain terms, and did not state other lifting parameters. Without countervailing evidence, then, I find Claimant is confined to employment that conforms with these restrictions.

Mr. Netter's physical impediments did not preclude his performance of the positions that Mr. Sanders outlined his reports regarding security guard work, beginning in February, 1997. (EX 14). His reports reflect familiarity with Claimant's medical condition and restrictions through the reports of Drs. Crotwell and Winters, and with Claimant's employment and education background as well. As early as February 1997 Mr. Sanders specified three security guard positions available in Claimant's proximity that were full time and paid between $4.75 and $5.00 per hour. While Dr. Crotwell did not approve of cashier and fuel booth attendant work as of April, 1997, he permitted guard work, but expressed a degree of reservation as to the guard work as described to him. Subsequently, as of July 16, 1998 Dr. Crotwell approved of these jobs, as they were described in a letter dated July 8, 1998. As of that date, no reservations were expressed.

It is apparent, therefore, that Claimant was capable of the jobs described as of July 16, 1998, and shortly thereafter, on July 31, 1998 two positions clearly within the doctor's approved categories were presented to Claimant. (EX 14). Lifting was minimal for the two security positions, according to the descriptions, and nothing therein contradicted Dr. Crotwell's proscribed activities. Moreover, the counselor indicated that his referrals conformed with Claimant's restrictions, and that the prospective employers had been contacted regarding Claimant's desires to work. Nothing in the record contradicts the impression conveyed that the security jobs were available and conformed with Mr. Netter's work restrictions. He was referred to other positions as well, including those presented by Mr. Walker. However, the record is unclear as to the appropriateness of cashier/cleaning, cab driving, heavy equipment operator and the other jobs described for someone with Mr. Netter's right arm debility, and many of the descriptions lacked the requisite specificity as to hours, salary, tasks involved, etc. Given Dr. Crotwell's clearest approval of security work as of July 16, 1998, the showing that shortly thereafter these jobs were available (indeed, Claimant was referred to several employers for such work thereafter), their proximity to Claimant, his work capabilities and his background, I find that suitable alternative employment was available as of July 31, 1998.

Claimant's efforts to show that he cannot procure such jobs despite his diligence are unpersuasive. His testimony makes it clear that his selectivity regarding appropriate wages and benefits precluded him from working for most of the employers to which his rehabilitative counselors referred. (TR 52, 76). Indeed, although he stated that he would accept security work, he further indicated that the wages he would receive were unacceptable, in light of his higher wages and greater benefits from his prior work for Employer. (TR 52). Moreover, I found his testimony regarding his efforts to procure these and other positions lacked the requisite degree of specificity to satisfy his burden. On the whole, the record conveys that Claimant can perform the security work detailed by Mr. Sanders and approved of by Dr. Crotwell, and, with diligence, these jobs appear to be attainable as well. Thus, I find Claimant's disability became partial in extent on July 31, 1998.

As to the nature of Claimant's disability, as stated above, Claimant achieved MMI as of November 16, 1996. Thereafter he retained a permanent physical impairment to his right arm, as seen by review of the records of Drs. Crotwell and Rutledge, and as anticipated by Dr. Winters. Thus, Claimant's disability became permanent as of November 16, 1996.

Compensation

In light of the above findings, Mr. Netter's disability is at most partial. *See* 33 U.S.C. §908(c); *Southern v. Farmers Export Co.*, 17 B.R.B.S. 64 (1985). Therefore, the provisions of §908(c) govern the determination of his compensation. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 363, 366 - 367 (1980) (hereinafter "PEPCO"). Sections 908(c) and (1) provide that a claimant's compensation shall be 66 2/3% of his AWW, and he shall be so paid for 312 weeks in the instance of loss of arm use. Since Mr. Netter's injury falls squarely within this proviso, it is applicable in his case. *PEPCO*, *supra* at 273 - 274. Although the parties stated in their Joint Stipulation that the AWW is disputed here, Employer stipulated

to an AWW of $455.95 at the hearing and Claimant stipulated that he is not disputing that amount. (TR 16, 81). Based on the record and these stipulations, therefore, I find that to be an accurate reflection of Mr. Netter's AWW for his August 16, 1995 injury. *See also* EX 10.

Additionally, each physician to opine on the matter found a partial loss of use of Claimant's arm occurred due to the August 16, 1995 injury. Therefore, §908(c)(19), which provides for proportionate compensation in such circumstances, is applicable as well. It is necessary, therefore, to address the extent of Claimant's partial loss of arm use.

The opinions of Drs. Crotwell, Rutledge and Winters, and Claimant's testimony, specifically spoke to this issue. Claimant urges that Dr. Crotwell's finding of a 28% permanent, partial disability to Claimant's right arm be controlling, and asserts that Dr. Rutledge's 15% rating lacks a sufficient basis, in light of the AMA guidelines and an allegedly defective physical examination. I note initially that Dr. Winters' opinion on this point is worthy of little weight, in light of its prospective and speculative nature. I accord more weight to Dr. Crotwell's opinion on this point than to that of Dr. Rutledge. Dr. Crotwell was more familiar with Claimant's circumstances, having seen him since September 23, 1993. His reports contain sufficient detail to support his finding, demonstrate adequate familiarity with Mr. Netter's condition to render the doctor's opinion worthy of weight, and evince Claimant's progress throughout the period of recovery and up to his achievement of plateaued status on November 15, 1996. Moreover, Dr. Crotwell's credentials render him well-qualified to opine on this issue, as revealed by his Board-certified status as conveyed on his stationary.

Dr. Rutledge's report is detailed and reveals that he reviewed Claimant's medical records, including his x-rays and functional capacities evaluation. His opinion appears to be adequately founded upon Claimant's records, physical examination and histories, and is therefore worthy of some weight. However, I accord it less weight, in light of his non-treating physician status, and since he saw Claimant on one occasion only. Further, there is no indication in the record that Dr. Rutledge is Board certified, and thus on this record Dr. Crotwell appears to be better-credentialed. I note that I accord little weight to Claimant's testimony regarding the quality of Dr. Rutledge's examination, however. Mr. Netter's description lacked sufficient detail (he focused upon one aspect, namely, that of the doctor's examination - or lack thereof - of Claimant's arm), and what he did offer did not comport with the credible detail offered in the doctor's report. Further, there is little indication that Claimant possesses particular qualification to otherwise evaluate the visit. However, in light of the aforementioned reasons, I accord more weight to Dr. Crotwell's opinion on this point. Therefore, I find that Claimant suffered a loss of use of 28% in his right arm. When considered in conjunction with his prior disability in the amount of 10%, Claimant's net loss of use of his right arm as a result of his accident of November 16, 1995 is 18%.

Further, I find no merit in Claimant's contention that he is entitled to either temporary or permanent, total compensation benefits because he is "undergoing rehabilitation." *Claimant's Brief* at 28 - 29. Contrary to the situation in *Abbott v. Louisiana Ins. Guaranty Assoc.*, 27

B.R.B.S. 192 (1993); *aff'd*, 40 F.3d 122 (5th Cir. 1995), no showing has been made here that Claimant is capable of only minimum-wage work. Further, the claimant in *Abbott* was undergoing rehabilitative training as a medical technician, and the Benefits Review Board found that granting him continued permanent, totally disabled status was necessary in order to avoid consigning him to permanent underemployment, a result at odds with the intent of the Act. *Id.* at 194, 202 - 204). There has been no showing here that Claimant is undergoing training; indeed, the only such efforts specifically referred to in the record pertained to an earlier, unsuccessful attempt to attain truck-driver training. EX 13. Mr. Walker, claimant's rehabilitation counselor, generally referred to occupational training; however, no specific training to avoid the claimant's prospective situation in *Abbott* was documented. Indeed, review of the vocational counselor's reports reveals that they chiefly acted as employment placement counselors. *Abbott*, therefore, does not apply to these facts. Absent any authorization for such a finding, Claimant is not entitled to permanent, total compensation benefits simply because vocational rehabilitative specialists consult with him regarding job openings.

Penalties

Claimant has requested penalties on any award granted pursuant to §914, which provides that benefits not paid within 14 days after they become due be enhanced by 10%. §914(e); *Claimant's Brief* at 29 - 31. An employer's controversion of a claimant's right to compensation, in accordance with §914(d), precludes imposition of this penalty. §914(a), (e). The parties stipulated that Employer timely filed a notice of controversion for this matter. *Joint Stipulation, August 11, 1998* at 1. Adequate support for this stipulation appears in the record, and Claimant offers no argument to the contrary. *See Claimant's Brief* at 30 -31. Therefore, Claimant's request for penalties pursuant to §914 of the Act is denied.

Conclusion

For the above reasons, I find that Claimant was temporarily, totally disabled from August 16, 1995 until November 16, 1996, whereupon he was permanently, totally disabled. On July 31, 1998 he achieved permanent, partial disability status pursuant to Employer's demonstration of suitable alternative employment as of that date. His disability is in the amount of 28% to his upper right extremity, 18% of which is owing to his accident of August 16, 1995. Since his disability is scheduled under §908(c)(1), he is entitled to a total of 312 weeks of permanent, partial disability compensation payments.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is **HEREBY ORDERED** that: Ingalls Shipbuilding, Inc., shall:

1. Pay Claimant compensation for his temporary total disability from August 16, 1995 to November 15, 1996, excluding periods for which he has already been paid, and during which he attempted to work for Employer.

2. Pay Claimant compensation for his permanent, total disability from November 16, 1996 to July 30, 1998, excluding periods for which he has already been paid.

3. Pay Claimant compensation for his permanent, partial disability for 312 weeks for the period commencing on July 31, 1998, in the amount of 18% of his average weekly wage of $455.95, per week, excluding periods for which he has already been paid.

4. Pay interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director for all accrued benefits computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 B.R.B.S. 267 (1984).

5. Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and Carrier. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fifteen (15) days to comment

thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered after the informal conference. Services performed prior to that conference should be submitted to the District Director for his consideration.

Ainsworth H. Brown
Administrative Law Judge

Dated: January 6, 1999
Camden, New Jersey